No. 466.

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE NEW YORK LIFE INSURANCE CO.
Plaintiff in Error,

vs.

FRANK E. DINGLEY AS ADMINISTRATOR OF THE ESTATE OF WALTER FREDERICK DINGLEY, DECEASED,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WASHINGTON, WESTERN DIVISION.

HAROLD PRESTON,
Attorney for Defendent in Error.

E. M. CARR,
L. C. GILMAN,
I. D. McCUTCHEON,
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OBJECTION TO CONSIDERATION OF ERRORS ASSIGNED.

Comes now the defendant in error and hereby objects to the consideration by the Court of the alleged errors

assigned herein by the plaintiff in error for the following reasons:

1. Inasmuch as the alleged bill of exceptions does not affirmatively show that it contains all the evidence on which the cause was tried in the Circuit Court of the United States for the District of Washington, the alleged errors assigned cannot be heard or determined by this Court.

2. No proper, sufficient or legal bill of exceptions was certified by the Circuit Court of the United States for the District of Washington, or by any judge thereof, and the record herein contains no proper, sufficient or legal bill of exceptions.

3. No proper, sufficient or legal assignment of errors was filed in the Circuit Court of the United States for the District of Washington, and no proper, sufficient or legal assignment of errors appears upon record herein.

These objections are based upon the record herein and files of this Court.

HAROLD PRESTON,
Attorney for Defendant in Error.

E. M. CARR,
L. C. GILMAN,
I. D. McCUTCHEON,
M. GILLIAM,
Of Counsel.

ARGUMENT ON OBJECTIONS.

I.

The plaintiff in error has undertaken to assign seven errors (Record, pp. 89-92). Of these numbers 1, 2 and 3 are based upon the refusals of the Circuit Court to give certain instructions requested by the plaintiff in error. Number 4 is for refusal to instruct peremptorily for plaintiff in error. Numbers 5 and 6 are for alleged error of the Circuit Court in directing the jury to return a verdict for the defendant in error. The seventh is for alleged error in the reasons given by the judge of the Circuit Court for so directing the jury.

It is familiar law that the reasons given by the lower court for its ruling cannot be the basis of an assignment of error.

Clark vs. Deere & Mausur Co., 80 Fed. 534.
North American L. & T. Co. vs. Colonial Mortgage Co., 83 Fed. 796-803.
Russell vs. Kern, 69 Fed. 94; 16 C. C. A. 154.
Caverly vs. Deere, 66 Fed. 305; 13 C. C. A. 452.
Evans vs. Glass Co., 83 Fed. 706.

Therefore the seventh assignment is not to be taken into consideration.

In so much as the Court refused a requested peremtory instruction to the jury to return a verdict for the defendant in error, the alleged errors numbered 1, 2 and 3 are to be disregarded here. If the trial court was

right in giving the peremptory instruction, the instructions requested by the plaintiff in error are of no moment; if the trial court was wrong in giving the peremptory instructions, the case will be reversible for that reason, and the refusal of instructions requested by the plaintiff in error upon which rest alleged errors numbers 1, 2 and 3 would be of no moment.

E. H. Rollins & Sons vs. Board of County Commissioners, (*Circuit Court of Appeals, Eighth Circuit*,) *80 Fed. 692.*

So that the alleged assignments of error are narrowed down to three, numbers 4, 5 and 6, (really two only) and the discussion here proceeds further upon the theory that there are but the two assignments of error to be considered, to-wit:

"No. 4. (Record p. 91.) The Court erred in refusing to give to the jury the fourth instruction requested by the defendant, which instruction is as follows:

IV.

I instruct you to return a verdict in this action in favor of defendant."

"No. 5. (Record p. 92.) The Court erred in granting plaintiff's oral motion for a peremptory instruction to the jury to return a verdict for plaintiff."

"No 6. The Court erred in directing the jury to return a verdict for plaintiff."

An examination of the bill of exceptions (Record, pp. 57-88) shows that the plaintiff in error presented to the

court for settlement as the bill of exceptions, a narrative of certain things which took place at the trial, including portions of the testimony of witnesses; in other words, the bill of exceptions only purports to give, in narrative form, parts of the testimony of several witnesses. The record not only fails to show affirmatively that it contains all the evidence produced at the trial, but it shows the contrary, in that it is manifest in making up the bill of exceptions counsel only attempted to give a general summary of the evidence without reporting the testimony in full or in detail. There is no statement that the bill of exceptions contains all the evidence. The contrary appears, as above stated.

The rule is well-established that "whenever a litigant proposes to ask an appellate court to review the testimony and to determine whether or not there is any evidence to warrant a recovery or *to support a particular defense*, he should cause a statement to be inserted in the bill of exceptions showing affirmatively that it contains all the testimony that was heard or produced at the trial."

> *Taylor-Craig Corporation vs. Hage*, (*Circuit Court of Appeals, Eighth Circuit*), *69 Fed. 581-583; 16 C. C. A. 339.*

Upon the pleadings defendant in error (plaintiff below) was entitled to the verdict unless the plaintiff in error (defendant below) succeeded in establishing the controverted issue raised by the second affirmative defense pleaded in its answer.

"No principle of law and no rule of court requires the entire evidence to be embodied in a bill of exceptions, and hence the presumption is that the bill of exceptions does not contain all the evidence before the court at the time the motion was made. To overcome this presumption the bill of exceptions should contain a statement * * * to the effect that the above and foregoing is all the evidence." * * *

Atchison, T. & S. F. R. Co. vs. Myers, (*Circuit Court of Appeals, Seventh Circuit*) *63 Fed. 793-796; 11 C. C. A. 439.*

The point made has been twice expressly decided by the Circuit Court of Appeals for the Eighth Circuit.

E. H. Rollins & Sons vs. Board of County Commissioners, 80 Fed. Repr. 692-698.
Honey vs. Chicago B. & Q.R. Co. 82 Fed. 773-775.

In the first of these cases a verdict was directed by the Trial Court for the defendant. The bill of exceptions failed to show that it contained all the evidence which was produced at the trial of the cause. The same point was made in the Circuit Court of Appeals as is now made here, and of the point the Circuit Court of Appeals speaks as follows:

"Inasmuch as the bill of exceptions fails to show that it contains all the evidence which was produced at the trial of the case, the point is well made in behalf of defendant that the action of the Lower Court in directing a verdict for the defendant cannot be reviewed."

In the latter of the two cases the Trial Court directed

a verdict for the defendant. The bill of exceptions was regular in form and complete in all respects, save that it failed to state that it contained all the testimony given on the trial. On this point the court by Brewer, Circuit Justice, speaks as follows:

"In the absence of any showing that the record contains all the evidence, it is impossible to hold that the Trial Court erred in directing a verdict."

It is also well established that in order to obtain a review of the action of the trial court in *refusing* a peremptory instruction, the plaintiff in error must cause the bill of exceptions to show affirmatively that *all* the evidence is brought before the Appellate Court.

Denver & R. G. Ry. Co. vs. Lorentzen (*C. C. A. 8th Circuit*), *79 Fed. 291-2; 24 C. C. A. 592.*

Atchison T. & S. F. R. Co. vs. Myers, (*C. C. A. 7th Circuit*) *63 Fed. 793-6; 22 C. C. A. 268.*

Jefferson vs. Burhans, (*C. C. A., 8th Circuit*), *85 Fed. 924-6.*

There is, however, other and greater reasons for affirmance without consideration of the errors attempted to be assigned. Both parties requested a peremptory instruction. This was necessarily a request that the Court find the facts, and the parties are therefore concluded by the finding made by the Court upon which the resulting instruction of law was given. The facts having been thus submitted to the Court, this Court is limited, in reviewing the action of the Trial Court, to the consideration of the correctness of the finding on the

law, and must affirm unless there be *no evidence* in support thereof.

This proposition is pointedly held by the Supreme Court of the United States in the case of *Beutell vs. Magone, 157 U. S. 154.*

In the case cited (an action at law) at the close of the testimony counsel for plaintiff moved the Court for a peremptory instruction for plaintiff. Counsel for defendant asked the Court for a peremptory instruction for defendant. The Court granted the defendant's request, and upon the verdict rendered judgment for defendant. Error was assigned upon the peremptory instruction. The Court says: "The request made to the Court by each party to instruct the jury to render a verdict in his favor was not equivalent to a submission of the case to the Court without the intervention of a jury, within the intendment of Secs. 649-700 Revised Statutes. As, however, both parties asked the Court to instruct a verdict, both affirmed that there was no disputed question of fact which could operate to defeat or control the question of law. This was necessarily a request that the Court find the facts, and the parties are therefore concluded by the finding made by the Court upon which the resulting instruction of law was given. The facts having been thus submitted to the Court, we are limited, in reviewing its action, to the consideration of its correctness of the finding on the law, and must affirm *if there be any evidence in support thereof.*"

In the case cited the Court calls attention to the fact

that "the bill of exceptions contained all the evidence." In the case at bar it does not appear that the bill of exceptions contains all the evidence. Therefore it is impossible for this Court to review the finding of the Lower Court "upon which the resulting instruction of law was given." And for this reason, if there were no other, the judgment should be affirmed.

II.

The so-called bill of exceptions (Record, pp. 57-88) is so utterly defective and insufficient in form that no error can be predicated upon any of the exceptions therein set forth. It opens with the statement that the case came on for trial; then follows a statement that certain witnesses were called and sworn, with a narrative of the substance of parts of the testimony of each witness, and a transcript in full of the charge of the Court. It contains copies of certain documentary evidence. It is without the orderly and systematic arrangement necessary to a proper or sufficient bill of exceptions. As before stated, the only errors claimed are the acts of the Court in giving a premptory instruction for the defendant in error and refusing other instructions requested by plaintiff in error. None of these exceptions taken to the instructions or refusals to instruct are pointed by any evidence showing the applicability of such instructions. In order to reach a determination as to the correctness of the action of the Lower Court as to any question raised by the bill of exceptions or assignments of error (other than assignments numbered 4, 5 and 6) this Court would be compelled for itself to search through

the entire record for that particular fact to which the instruction under consideration is applicable. This the Court will not do. A bill of exceptions like that in the case at bar (save that in the case cited the bill of exceptions purported to embrace all the evidence) was before the Circuit Court of Appeals of the Fifth Circuit, and that Court said in the course of its opinion refusing to consider the assignments of error:

"It" (the bill of exceptions) "purports to embrace all of the testimony submitted by the parties. It all appears to be set out in the order of its introduction without any special local relation to any of the exceptions on which the eighty-seven assignments of error claim to repose. We will not tax our time and the patience of the reader by repeating the reasoning we have heretofore delivered on this subject. * * * The document referred to cannot be taken as a bill of exceptions."

City vs. Bear, 66 Fed. 440-445. 13 C. C. A. 572.
Phosphate Co. vs. Cummer, 60 Fed. 873; 9 C. C. A. 279.
Improvement Co. vs. Frari, 58 Fed. 171; 7 C. C. A. 149.
The Francis Wright, 105 U. S. 381.
Lincoln vs. Claflin, 7 Wall. 132.

Should the Court give consideration to the bill of exceptions in question it would take upon itself the burden of searching the record to find the evidence, if any there be, applying to each particular exception. We submit that this is the ~~providence~~ province of counsel, not of the Court; and if the counsel neglect to point except-

ions with the necessary evidence the Court should ignore them.

The position which we contend the Court should assume relative to such a bill of exceptions, is well stated by the Supreme Court of the District of Columbia as follows :

" The Court will not regard itself under any obligation to search through a mass of testimony inserted in a bill of exceptions, with a large amount of irrelevant matter and formal statements, to ascertain what there is that bears upon some specified ruling of the trial judge."

Railroad Co. vs. Fitzgerald, (*D. C. App.*) *22 Wash. L. Rep. 217.*
Railroad Co. vs. Walker, *Id. 223.*

While the various exceptions relied upon by plaintiff in error are all embraced in one document termed a bill of exceptions, we submit that each exception really constitutes a bill of exceptions by itself; that each exception must stand alone and be considered upon the matter, and that only, contained in itself. It is possible that matter outside of the exceptions itself might be made a part of it by proper reference; but the Court is not bound to look beyond the particular matter incorporated in the exception either directly or by proper reference to determine whether or not it is well taken ; and it has been established by repeated rulings of the National Courts that every bill of exceptions must be considered as presenting a distinct and substantial case, and it is

on the evidence stated in itself alone that the Court is to decide; and when exception is taken to instructions of the Court given or refused, such exception must be accompanied by a distinct statement of the testimony given or offered which raises the question to which the exception applies.

Insurance Co. vs. Raddin, 120 U. S. 183-195.
Jones vs. Buckell, 104 U. S. 554-556.
Worthington vs. Mason, 101 U. S. 149.
Dunlop vs. Munroe, 7 Cranch 242.

Considering therefore, that each of these exceptions constitutes by itself a separate bill and must stand or fall by the matter contained therein, it is apparent that no one of the exceptions can be considered by the Court, as there is no evidence incorporated therein, either directly or by proper reference, from which the Court can determine whether the instructions complained of was proper to be given or refused; and the Court can only determine the propriety of the instruction by itself examining the entire mass of testimony included in the bill of exceptions in the order of its introduction, and segregating therefrom the evidence, if any, applicable to any particular instruction.

What has been heretofore said under this heading has been directed to the assigned errors numbered 1, 2 and 3. Assignment of error number 7, going to the reasons expressed by the Lower Court for its ruling, being, as above stated, not a proper subject for assignment of error, is to be disregarded. In considering an assign-

ment of error like assignment of error numbers 4, 5 and 6, it is necessary and proper for the Appellate Court to examine all the evidence which was before the Lower Court at the time the peremptory instruction was given. It is also necessary that the Court in going into the statement of the evidence contained in the bill of exceptions in order to examine it all, should find there *all* the evidence which was before the Court. In so much as the Court in the case at bar is not able to see from the record what was before the Trial Court at the time the Trial Court gave the peremptory instruction, the peremptory instruction (the peremptory instruction refused as well) cannot be reviewed by the Court.

III.

The assignment of errors is as defective as the bill of exceptions in the particulars above enumerated. The sufficiency of such an assignment of errors has recently been twice before the Circuit Court of Appeals of the Fourth Circuit, and in each case that court has refused to consider errors so assigned.

Newman vs. Steel & Iron Co., *80 Fed. 228-234;* —— *C. C. A.* ——.

Surety Co. vs. Schwerin, *80 Fed. 638;* —— *C. C. A.* ——.

In the first of these cases the Court says:

"So far as the assignments relate to instructions asked for and refused, they neither quote nor refer to the evidence that shows the relevancy of the propositions of

law propounded by such instructions, and we therefore presume that no such testimony was before the jury, in which event it was evident that the Court below did not err in refusing to give them."

In the latter of the two cases the Court says:

"We are unable to consider the point suggested by counsel for the plaintiff in error concerning the refusal of the Court below to give the instructions asked for by the defendant, for the reason that the evidence, if any there was, showing the relevancy of the propositions of law propounded thereby, is neither quoted in full nor its substance referred to in the assignments of error."

A reference to the assignments of error herein (Record, pp. 89-97) discloses that in no one of the assignments, based as all are upon instructions given or refused, is contained any allusion to the evidence, and the Court will therefore presume that as to instructions given the Court had evidence before it making such instructions proper, and as to instructions refused that there was no evidence upon which the Court could base the instructions asked for. It should be noted in this connection that the rules of the Circuit Court of Appeals of the Fourth Circuit relative to bills of exceptions and assignments of error are identical with those of this court. (*See compiled Rules Circuit Court of Appeals, 78 Fed. pp. XXXI, et seq.; Rules Fourth Circuit, 78 Feb., p. LVI; Rules Ninth Circuit, 78 Fed., p. CII.*)

We therefore submit that none of the errors assigned can be considered by this Court, that the assignment

thereof should be ignored, and the judgment of the lower court affirmed.

Without waiving the objections hereinbefore made to the consideration of the bill of exceptions and assignment of errors, the defendant in error submits the following brief.

ON THE MERITS.

PRELIMINARY.

There can be no question but that the policy is a New York contract, and the statute of New York ~~took~~ a part of it.

Equitable Life Assur. Soc. vs. Nixon (C. C. A., 9th Circuit,) 81 Fed. 796-798.

Equitable Life Assur. Soc. vs. Trimble, (C. C. A., 9th Circuit), 83 Fed. 85-86.

Hicks vs. National Life Insurance Co. (C. C. A., 2nd Circuit) 60 Fed. 690-692.

Griesemer vs. Mutual Life Insurance Co. of N. Y., 10 Wash., 202; 38 Pac. Repr. 1031.

Griesemer vs. Mutual Life Insurance Co. of N. Y., 10 Wash. 211; 38 Pac. Repr. 1034.

In fact it is expressly so provided in the application, (Printed Record, pp. ~~1 to 5~~ 15) which by express provision of the policy (Printed Record, p. 6) is made a part of the contract. The plaintiff in error by its answer (Printed Record, p. 36) sets up the New York statute

as a part of the contract. This point is not controverted in the brief of plaintiff in error. So defendant in error assumes it to be established and conceded for all purposes of the case.

I.

On the first page of the policy (Record, p. 6) it is provided.

"This contract is made in * * * consideration of the sum of $158 to be paid in advance, and of the payment of a like sum on the 19th day of July in every year thereafter during the continuance of this policy until twenty full years' premiums shall have been paid."

"The benefits and provisions placed by the company on the next page are a part of this contract, as fully as if recited over the signature hereto affixed."

On the "next" page of the policy (Record, p. 9) it is provided *inter alia.*

"If any premium is not thus paid on or before the day when due, then (except as hereinafter otherwise provided) this policy shall become void, * * *."

And, (Record, pp. 9–10):

"Grace.

After this policy shall have been in force three months a grace of one month will be allowed in payment of subsequent premiums, subject to an interest charge of five per cent per annum for the number of days during which the premium remains due and unpaid. During said month of grace the unpaid premium,

with interest as above, remains an indebtedness due the company, and in the event of death during the said month this indebtedness will be deducted from the amount of the insurance."

The two provisions last quoted are under a heading "Benefits and Provisions referred to in this Policy."

The company by its receipt for the 1895 premium on the policy (Record, p. 74) speaks of the effect of the *grace*, as follows: "During this month of grace the policy is continued in full force."

The same construction is placed upon the policy by the company in the notice which it claims to have mailed to assured, (Record, p. 64.)

The New York statute is as follows: (Sec. 92, laws 1892, found in laws of N. Y., 1892, Vol. 2, p. 1972.)

Sec. 92. No forfeiture of policy without notice. No life insurance corporation doing business in this state shall declare forfeited, or lapsed, any policy hereafter issued or renewed, and not issued upon payment of monthly or weekly premiums, or unless the same is a term insurance contract for one year or less, nor shall any such policy be forfeited, or lapsed by reason of non-payment when due of any premium, interest or installment or any portion thereof required by the terms of the policy to be paid, unless a written or printed notice stating the amount of such premium, interest, installment, or portion thereof, due on such policy, the place where it should be paid, and the *person* to whom the same is payable, shall be duly addressed and mailed to the person whose

life is insured, or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last known post-office address, postage paid by the corporation, or by an officer thereof, or person appointed by it to collect such premium, at least fifteen and not more than forty-five days prior to the day when the same is payable.

"The notice shall also state that unless such premium, interest, installment, or portion thereof, then due, shall be paid to the corporation, or to a duly appointed agent or person authorized to collect such premium by or before the day it *falls due*, the policy and *all payments thereon* will become forfeited and void except as to the right to a surrender value or paid up policy as in this chapter provided.

"If the payment demanded by such notice shall be made within its time limited therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment; and no such policy shall in any case be forfeited or declared forfeited, or lapsed, until the expiration of thirty days after the mailing of such notice.

"The affidavit of any officer, clerk or agent of the corporation, or of any one authorized to mail such notice, that the notice required by this section, has been duly addressed and mailed by the corporation issuing such policy shall be presumptive evidence that such notice has been given."

The first annual premium was paid at the issuance of the policy. The premium for 1895 (the second) was

promptly paid. By the latter payment the policy was continued in force to and including the 19th day of August, 1896.

The company claims that the alleged notice of forfeiture was mailed at San Francisco June 27th, 1896, (Record, p. 65). If the notice was mailed at all, it was (according to the record here) mailed on that day. The mailing then took place (excluding from computation the first day) 53 days before the day on which forfeiture for non-payment became possible,—a period 8 days longer than the longest period permitted by the statute.

The construction placed by the company upon the meaning of the "grace" provision of the policy, *i. e.*, that during the grace period the policy is continued in full force, is the same as that placed thereon by the courts.

McMaster vs. N. Y. Life Ins. Co., 78 Fed. 33.

People vs. Commercial Alliance Ins. Co., 48 N. Y. Supl. 389.

Connecticut Life Ins. Co. vs. Hoffman, 42 S. W. Repr. 1104 (Ky.)

By the payment of the annual premium the policy continued in force for 13 months from the date expressed on the first page of the policy.

McMaster vs. N. Y. Life Ins. Co., supra.

The policy when once put in force by the payment of the first annual premium became a continuing contract terminable (by non-payment of a premium) only by a

full compliance with the New York statute on the part of the company. It is in any similiar case only necessary for the plaintiff to prove the issuance of the policy. The defendant has the burden of pleading and proving a forfeiture.

Baxter vs. Brooklyn Life Ins. Co., 119 N. Y. 450; S. C. 23 N. E. Repr. 1048.

The object of the statute is that the company before forfeiting the policy for non-payment of premium shall give notice to the insured, which shall be so certain and peremptory in its character as to be a warning of a result absolutely to happen if he suffer the policy to lapse by its terms; in other words, if he allows the last day which the policy gives him for payment of premium to pass by without payment being made. It is the plain intent of the statute that this warning shall be given not less than 15 nor more than 45 days before the arrival of *that day*. The warning must be so certain and peremptory in its terms and so recent as to bring immediately and clearly to mind the consequences of neglect to heed it.

Hicks vs. Mutual Life, 60 Fed. 692; 9 C. C. A. 215.
Baxter vs. Brooklyn Life, supra.

Under the provisions of the policy (considering it without regard to the statute) the duration and validity of the policy is dependent upon payment of the premium prior to the expiration of the grace period.

But under the provisions of the policy, and the statute taken together, "the duration and validity of the

policy is not, then, dependent upon the payment of the premium on the day named therein, but upon payment within 30 days after the statutory notice has been given."

Baxter vs. Brooklyn Life, supra.

The notice which the company claims to have given (Record, p. 63), as the company construes it, required the premium to be paid on or before July 19th, on penalty of forfeiture. Under the statute (disregarding for the moment the "grace" provision of the policy) the assured had until July 26th to pay, and forfeiture was permissible for failure to pay on or before that day; where as by the "grace" provision of the policy forfeiture was impossible prior to August 19th. The company asks this court to hold that the statute operates to *shorten* the time allowed the insured by the policy to pay the premium, and indeed that is the only theory by which the company can escape the inevitable conclusion that the notice was mailed more than 45 days prior to the default day. The notice fixed the default day at one of two dates, to-wit, either July 19th or August 19th. If the former, the notice was given within the statutory period, but named the wrong default day, a day when—and for 30 days ensuing—the policy was in full force by virtue of the payment made in the preceding year; if the latter, it was prematurely given.

The alternatives otherwise expressed are the following:

1. Either erroneous notice was timely given; or,

2. Correct notice was given prematurely.

In either event the policy was not thereby forfeited.

It is respectfully submitted that while it is true that "the statute dominates the policy" (*Hicks vs. National Life Ins. Co., supra; McMaster vs. N. Y. Life Ins. Co., supra; Equitable Life Ins. Co. vs. Trimble, 83 Fed. 86*), yet the policy and the statute are to be construed together and the provisions of the two harmonized, so that any seeming inconsistency shall be avoided if possible. The aim should be to soften, where permissible, the forfeiture features of the policy. Such is the aim of the statute.

The Court of Appeals of New York construing the statute (of New York) has, in *Baxter vs. Brooklyn Life Ins. Co., supra*, well expressed the principle here applicable, as follows:

"When the provisions of the statute are adopted in a contract of insurance for the purpose of modifying the forfeiture clause and the other strict conditions contained therein, then this clause and these conditions shall be so construed as to give to the assured the full benefit contemplated without altering any other provision of the policy, if this can be done without violating any rule of law."

"It has been several times decided by the Court of Appeals of New York that the provisions of the statute (meaning the New York statute which is now before the Court) respecting forfeitures shall be strictly interpreted in favor of the assured, and that the defense of a forfeiture for non-payment of premium is not available to

the insurance company if there has been any departure on its part from the provisions of the statute in regard to notice."

Equitable Life Assurance Society vs. Nixon, 81 Fed. 796-800.
Hicks vs. National Life Ins. Co., supra.

The company claims that the date named on the first page of the policy is to be regarded as the date referred to in the statute, and calls it the *due date.*

It is confidently asserted by the defendant in error on the contrary that the date referred to in the statute is the *default* date.

The statute reads "nor shall any * policy be forfeited or lapsed, *by reason of non-payment when due* of any premium * * required by the terms of the policy to be paid unless a * * notice * * shall be mailed * * at least 15 and not more than 45 days prior to *the day* when the same is payable." It is as if it read—No policy shall be forfeited for default unless notice be mailed not less than 15 nor more than 45 days before the default day. The statute is dealing with forfeiture for default, and the day of default is in the eye of the statute when it fixes the mailing period.

"Not only must the right to forfeit exist by the terms of the contract, but it must be asserted in a particular way."

Schad vs. Security Mutual, 42 N. Y. Supl. 314.

It is true that there is no decided case directly in

point. The "grace" provision is peculiar to the policy of this company. However, the principle we contend for as to the meaning of the statute is declared in the case of a policy not having the "grace" provision.

DeFrece vs. Nationl Life Ins. Co., 136 N. Y. 144; 32 N. E. Repr. 557.

as follows:

"The agreement of the insured was to pay $63.74 annually on the 29th of October, and under the law of this state a failure to make such payment would not work a forfeiture of the policy, unless the defendant, more than 30 and less than 60 days prior *thereto*, served upon the insured a notice that if that sum was not paid on or before *that day* the policy would become lapsed and forfeited."

The "due date" in our policy was, after the policy had been in force three months, August 19th.

There is no decided case directly in point supporting this contention rendered in a case of *grace* on insurance premiums, but the term as used in the policy is borrowed from the commercial law, and that the term has that meaning and the giving of a time of "grace" the effect to postpone maturity till the expiration of the period of grace, is well settled.

Bills of exchange and promissory notes are not due until the end of the three days of grace.

Bouvier Law Dictionary "Due."

In *Ogden vs. Saunders, 12 Wheat. 213-342,*

Chief Justice Marshall says: "Since by contract the maker is not liable for his note until the days of grace are expired, he has not broken his contract until they expire. The duty of giving notice to the endorser of his failure does not arise until the failure has taken place."

(*Quoted from Story—Promissory Notes, p. 254.*)

The Supreme Court of the United States in *Bank of Washington vs. Triplett, 1 Pet. 32*, says: "The allowance of days of grace is a usage which pervades the whole commercial world. It is now universally understood to enter into every bill or note of a commercial character, and to form so completely a part of the contract that the bill does not become due in fact or in law on the day mentioned on its face but on the last day of grace. A demand of payment previous to that day will not authorize a protest or charge the drawer of the bill.

1 Daniels Negotiable Instruments, Sec. 614,

speaking of days of grace says: "They form so completely a part of the instrument that it is not due in fact or in law until the last day of grace; therefore the demand of payment on the day before or after the third day of grace would not authorize a protest or charge the drawer or endorser."

There are however, some insurance cases discussing the effect of the grace period for the payment of premiums. The following is a summary of them:

Connecticut Life Co. vs. Hoffman, supra,

was a case of a policy requiring payments to be made

bi-monthly on the 5th of the month or within thirty days from date of notice. The insured died after the 5th and before the expiration of the 30 days, and the company defended on the ground that the policy had lapsed because of non-payment on the 5th. The Court says: "The language does not import that the premiums were due on the 5th of the month named, because it said that they can either be paid at such dates or within 30 days after the date of the notice."

It was claimed by the company that the thirty days were simply days of grace. The Court says:

"There can be no doubt that the meaning of this provision is that the contract remained in force for 30 days."

People vs. Commercial Alliance Insurance Co., supra.

The question of whether the policy was in force at the date of the death depended upon whether a payment reaching the company on the 5th of February, 1894, was made within the time. The policy provided that it might be renewed bi-monthly so long as payments were made on the first day of each and every other month—the policy to be void unless premiums promptly paid. The table of premiums contained a statement from which it might be inferred that the premium might be paid at any time during the first month of the bi-monthly period: in other words, that a premium expressed to be payable on the first of January might be paid at any time during January. These provisions seemed inconsistent. The course of dealing between the parties for years had

been for a notice to be given that the premium for a certain month would be due on the first of that month and unless paid before the first of the *next* month the policy would be void. Under these notices the assured had made his payments during the grace period for some years. During the year immediately preceding the death the form of notice issued by the company had been changed by omitting reference to the grace period.

Held, that the insurance company had placed its own construction upon the policy in the respect aforesaid.

"To this so-called grace the assured was entitled by the terms of the policy under the construction given to it by the company itself."

Held, that the payment was made timely and the policy was therefore in force at the time of the death.

The dissenting opinion by Judge Barrett is that the company was not to be held under the facts to have made such a construction of its contract. The dissenting opinion, however, undoubtedly concedes that if that was the contract, a payment made at any time during the grace period was a timely payment, and the so-called grace period was a matter of right, not of grace.

McMaster vs. N. Y. Life, supra. (Opinion by Shiras, District Judge Northern District of Iowa.)

The provisions in the policy were like those in the Dingley policy. The due date upon the face of the policy was the 12th of December. The policy was delivered on the 26th of December, 1893, dated December 18th, and the first payment then made. No further pre-

miums were paid. The insured died on the 18th of January, 1895. The defense was that the policy had lapsed for non-payment of the premium. The case was first brought at law and afterwards in equity to reform the contract so as to change the due date to the 26th of December, the date of the delivery of the policy, instead of the 12th, as stated therein, so as to bring the death of the insured within the 30 day grace period. The court in speaking of the 30 day clause says: "This clause clearly points to a month of grace not covered by the premium already paid, and fully justified the insured in the assumption that if he paid the first annual premium in full he would be entitled to one year's protection and also to one month of grace to be added thereto, or, in other words, to a period of thirteen months during which the policy could not be declared forfeited by the company. If there exists some question touching the meaning to be given to this clause it must be solved against the company."

The court further says: "Assuming that at law the parties are bound by the date thus fixed for the second payment of the premium, the question still remains whether, from the fact that the second and subsequent premiums are made payable on the 12th of December, it necessarily follows that the policies could be declared forfeited by the company until after the expiration of the thirteen months from the date thereof. At law the question would seem to turn upon the proposition whether the insured by paying the first annual premium in full became entitled to a contract of insurance

which could not be forfeited until after the expiration of thirteen months; because if that was the contract, then the court would be justified in so construing the clause with regard to forfeiture for non-payment of subsequent premiums as to hold that the same did not become applicable and in force until after the expiration of the thirteen month period. * * * If the policy had not antedated the time of the payment of the second and subsequent premiums, making the same payable in advance, there would be no question of the liability of the company, because, it being admitted that the first year's premiums were paid in full, then the insured became entitled to a month's grace; and the insured died within the month of grace, thus entitling the company to deduct from the face of the policy the amount of the second premium with interest thereon. When the policy was delivered, upon payment of the first year's premiums there was then created a valid contract of insurance, not for one year, but a continuing contract extending over the life of the insured, which could not be forfeited for non-payment of premiums, so as to deprive the insured of the protection thereof during any period of time covered by the payments already made. Therefore, at law the question is, for what period of time was the policy rendered non-forfeitable by the payment of the first year's premiums? It is admitted that the contract did not take effect until December 26, 1893, when the first year's premiums were paid, and the policy was delivered to the insured. If the policy did not contain the clause allowing one month's grace, the payment of the premiums would certainly have prevented

a forfeiture for one year from December 26, 1893. Unless a period of a month be added thereto, the insured is deprived of the benefit of the period of grace which was promised him. If this period is allowed then the policy was in force at the date of the death. Upon what theory or principle can the insured be rightfully deprived of the benefit of this period? It cannot be questioned that if the company had followed the usual rule, and had made the time for the payment of the second and subsequent premiums to count from the date of the policies, there would be no doubt of the liability of the company. If the second and subsequent premiums had been made payable on December 18th, then the month's grace would date from December 18th, and the policy would not be forfeited until after January 18th following."

II.

So far the argument has proceeded generally upon the assumption that the contents of the notice were such as to substantially comply with the provisions of the New York Statute relating thereto. It is respectfully submitted that the notice falls short of such compliance. The notice is found in the printed record at page 63 et. seq.

It has already been shown that strict compliance with the statute on the part of the company is essential to to work a forfeiture, and that the Courts do not favor forfeitures.

The notice fails to comply with the statute because

of its uncertainty as a warning that the company would forfeit for default on a day certain.

On the face of the card the insured is informed that the premium falls due July 19th, and if not then paid the Company will forfeit the policy. On the back of the card, under the heading "Notice to Policy Holders," the insured is informed that "if any premium is not thus paid on or before the day when due then (*except as otherwise provided*) the policy shall become void and the payments previously made shall remain the property of the company."

"If any premium is not paid upon the date when due, a grace of one month is allowed by the company within which the overdue premiums will be accepted if paid with interest at the rate of 5 per cent. per annum. During this month of grace the policy is continued in full force."

"The acceptance of any premium by the company after the expiration of the months grace is subject to the condition and upon the express warranty on the part of the holder of the policy that the insured is in good health, and is not to be construed as a waiver of the conditions of the policy as to future payments, nor as establishing a course of dealing between the company and the holder of the policy."

This defect in the notice is clearly exposed by the Honorable Circuit Judge's opinion, and his discussion thereof (Record pp. 92-96) is all sufficient. We quote here the closing sentence which concisely sums up the argument: "This insured person is informed in one

part of the notice that his insurance will be forfeited unless the premium is paid on or before July 19th; the notice goes on then with voluminous explanation of how that effect will not take place, and it fails entirely to serve as being the warning which the statute provides must be given as a condition to the right of the insurance to forfeit the policy.

The view taken by Judge Hanford is in accord with those of other courts in analogous cases.

In Schad vs. Security Mutual Life Association, *supra*, the court speaks of the (N. Y.) statute as follows: "It was one of the essential features of the statute that the insurer should in its notice declare distinctly its design to forfeit the policy as well as the payments previously made thereon, in case the (premium) payment was not made. The contract by its terms would become void on such non-payment, but that was not enough. Not only must the right exist by the terms of the contract, but it must be asserted in a particular way. The notice was in the nature of a warning to the policy holder. Significant and unequivocal language was specified in the statute, and no good reason is apparent in this case why it was not used in the notice given."

The Supreme Court of Washington in *Griesmer vs. Mutual Life Ins. Co.*, *10 Wash.*, *202-209*, speaks of the requirements of the notice imposed by the New York statute as follows: "Courts * * * must assume that the legislature meant not only to have the minds of the policy holders refreshed by the notice as to their duties under the policy, but also to have stated in such

notice and brought directly home to them, the consequences flowing from the non-payment of the premium."

In *DeFreece vs. National Life Ins. Co.*, *supra*, the company gave two statutory notices, one for a default occurring October 27, a due date (to which notice attention has been hereinbefore directed), and one for a default occurring January 29 (also a due date). In connection with this later default it appeared that the company had agreed to indulge the insured, allowing him a reasonable time after due date within which to make the payment. The notice is held ineffectual to forfeit the policy.

In *Phelan vs. Northwestern Mutual Life Ins. Co.*, *113 N. Y., 150; 20 N. E. Repr., 827*, the material parts of the notice were: "The conditions of your policy are that payment must be made on or before the day the premium is due, and members neglecting so to pay are carrying their own risk. * * * Prompt payment is necessary to keep your policy in force." The court says of it: "We are also of opinion that the notice does not in its terms conform to the statute. Many ignorant and unlearned people seek to avail themselves of the advantages proposed by these companies. The statute is designed for the protection of all classes, and the language it prescribes for notice is intelligible to all. To say that in a declared event 'a policy will become forfeited and void' conveys a meaning easily to be comprehended. To refer to the policy and its conditions and say that 'members neglecting so to pay are carrying their own risk' is quite another thing; and

while it may be comprehensible to those versed in the language of insurers and accustomed to their phraseology, it is not the language of the statute and does not embody the notice which the statute requires."

In *Merriman vs. Keystone Mutual Benefit Association, 18 N. Y. Supp., 305*, the court says:

"Having regard for the intelligence and technical knowledge of the class of persons to whom such insurance is made most attractive, we are unable to say that the notice, as actually served, conveyed any such idea to the assured. We content ourselves by holding that it did not necessarily convey such idea" (Meaning the certainty of forfeiture).

(Affirmed 155 N. Y., p. 16, Appendix; 49 N. E. Repr., 1104.)

III.

The notice claimed to have been given to insured in this case departs from the statutory requirements in another particular. The statute provides: "The notice shall also state that unless such premium * * * * shall be paid * * * the policy will become forfeited and void except as to the right to a surrender value or paid up policy *as in this chapter provided.*"

The notice provides instead of the said policy requirements: "Unless such premium * * shall be paid, * * * such policy * * will become forfeited and void, except as to the right to a surrender value or paid up policy which may be *provided in said policy or by statute.*"

IV.

There is some question if the requirement of the statute that the notice shall state *the person to whom the premium is payable*, is complied with in the statement contained in the notice that the premium is payable "at the home office, 346 and 348 Broadway, New York, to the Cashier of the Company, or to Fred G. Redding, Cashier, Mills Building, San Francisco, Cal., on the production of the official receipt therefor."

In conclusion it is respectfully submitted that the judgment of the Circuit Court should be affirmed.

HAROLD PRESTON,
Attorney for Defendant in Error.

E. M. CARR,
L. C. GILMAN,
I. D. McCUTCHEON,
M. GILLIAM,
Of Counsel.